
Victim Rights in Indian Country - an Assistant United States Attorney Perspective

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It is Monday and there are 381 miles from the federal courthouse in Salt Lake City to Monument Valley, Utah. This morning's initial appearance was uneventful, the suspect was detained pending tomorrow's detention hearing. I left the courthouse at 10:00 a.m. and immediately hit the road. I have been driving for three hours now. It is a beautiful day and visibility is limited only by the topography of the surrounding terrain. The contrast between the red cliffs and the azure sky is striking. I am almost half-way there and I have time to think about this past weekend's events. (This hypothetical is fictional; the names used are also fictional).

As an Indian country violent crime prosecutor for the United States Attorney's Office in the District of Utah, I have had to constantly think about the implications of various laws and prosecution principles and how they affect my cases. There are jurisdictional principles that govern Indian country criminal prosecutions. For example, the Major Crimes Act (18 U.S.C. § 1153) and the Indian Country General Crimes Act (18 U.S.C. § 1152) provide the jurisdictional basis for most federal prosecutions of criminal offenses which occur in Indian country (18 U.S.C. § 1151). There are evidentiary principles and constitutional principles that govern all federal criminal prosecutions. In addition to all of this, there are established principles which apply when dealing with victims and witnesses of federal crime. Two tools which are extremely valuable to the Assistant United States Attorney (AUSA) prosecuting Indian country crimes are The

Attorney General Guidelines For Victim And Witness Assistance (2000) (hereinafter, "Guidelines" or "Guideline") and Victim And Witness Rights: United States Attorneys' Responsibilities (2002).

Actually, it all started at 2:32 a.m. this past Sunday morning. That's when FBI Special Agent Toddman called me at home. "We just had an aggravated assault on the Navajo Nation reservation...in Monument Valley". Agent Toddman told me that someone had broken into Samantha Yazzie's home at about 10:45 p.m. and attacked her. Agent Toddman said that she had not been sexually assaulted nor seriously harmed. The attacker had placed a large, cold knife to her throat. As he pressed the blade down on her neck, he said that it was all because she "told someone about the other day". Ms. Yazzie's 9-year-old daughter then walked into the room and screamed when she saw what was happening. The attacker ran from the mobile home. Fortunately, the victim received only a minor cut on her neck; however, she could not identify the suspect because the room was dark when it happened. Two 19-year-old boys who were driving by saw a man run out of the Yazzie home. When the man ran under a streetlight, they recognized him as John Atakai, a local trouble-maker. When Navajo Nation police showed up and began securing the crime scene, the boys told tribal police Officer Leroy Hanks about Atakai. Tribal police found Atakai hiding nearby behind an abandoned schoolhouse. They arrested him without incident for the tribal law offense of assault and took him to the local tribal police holding cell. A search incident to arrest produced a fisherman's fillet knife. Knowing that tribal courts are limited to misdemeanor punishment (per 25 U.S.C. § 1302(7)), the

tribal officers contacted the FBI right away. After getting clearance from me for an arrest, Agent Toddman took Atakai into custody for Assault With A Dangerous Weapon in violation of 18 U.S.C. § 113(a)(3). Jurisdiction was based on the Major Crimes Act, 18 U.S.C. § 1153 for offenses committed in Indian country.

Pursuant to 42 U.S.C. § 10607(a), Congress requires the Attorney General (AG) to designate an official who is responsible for identifying victims of crime and for the provision of services. The AG did this in Guidelines I.F.1.a. and IV.A.1.a. which provide that during the investigatory stage of a case, the FBI Special Agent-in-Charge is the "responsible official". A "victim" is defined as "a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime. . . ." Guideline I.E.2. In this case, Samantha Yazzie, as a direct "victim" of violent crime is a victim as defined by the Guidelines.

One of the first tasks that the responsible official must do is to identify the victims. 42 U.S.C. § 10607(b)(1); Guideline IV.A.2. During the investigatory stage, (per 42 U.S.C. § 10607(b)-(c) and Guideline IV.A.3.a.1.) the FBI is also required to notify the victim of various information including:

- that she has a right to receive services;
- where and how to request such services;
- where she can obtain emergency medical and/or social services;
- restitution programs to which she may be entitled to receive assistance; and
- programs available for counseling, treatment, and other support.

In addition, other information must be provided in certain cases involving domestic violence or sexual assault. It is also noteworthy that the FBI is responsible for arranging for reasonable protection from the offender. 42 U.S.C. § 10607(c)(2); Guideline IV.A.3.b.

I need to get to Monument Valley before sundown so that I can see the area around the

Yazzie home in daylight. If I get there after sundown, then at least I'll see what the lighting situation was like when the teenagers saw Atakai. Inadequate lighting for a visual identification is likely to be claimed by the defense. FBI Agent Toddman and Lieutenant Nakai of the Navajo Police will meet me at the mobile home at 5:00 p.m. -- I'm running on time. My thoughts turn to the 9-year old daughter. She is apparently taking it very hard and has not spoken since the attack. I'm glad that Atakai is in custody. I filed the Complaint this morning (the Grand Jury does not meet until Wednesday and will not be able to consider indictment until then).

After charges are filed, the U.S. Attorney takes over as the "responsible official" per Guidelines I.F.2.a. and IV.B.1. The United States Attorney's Office (USAO) is now responsible for providing the victim with a variety of services. For starters, a victim of federal crime has "The right to be notified of court proceedings," 42 U.S.C. § 10606(b)(3), Guideline III.B.3. and, subject to certain exceptions, the right to be present at "public court proceedings related to the offense." 42 U.S.C. 10606(b)(4); Guideline III.B.4. The USAO must provide the victim with the "earliest possible notice" of such things as release or detention status of the suspect, filing of charges, scheduling of hearings (including notice of continuances), acceptance of pleas, and sentencing. Guideline IV.B.2.a.(1). The USAO should provide information concerning the criminal justice process, including what to expect as well as what the USAO expects of the victim. Guideline IV.B.2.a.(3). The USAO also must refer the victim to local service providers. Guideline IV.B.2.a.(4). Although the investigative agency is responsible for providing protection for victims and witnesses, Assistant U.S. Attorneys can use civil remedies to help prevent the intimidation of witnesses. For example, 18 U.S.C. § 1514 authorizes the bringing of civil actions to restrain harassment of victims or witnesses. Remedies under this statute include temporary restraining orders (18 U.S.C. § 1514(a)) and protective orders (18 U.S.C. § 1514(b)).

I drive onto the Navajo Nation reservation at 4:14 p.m. The Navajo reservation is the largest reservation in the U.S. and roughly the size of West Virginia. "The Rez", as it is called locally, hangs down from southeast Utah, covers the northeast quarter of Arizona and then swings over into northwest New Mexico. Most of it consists of high altitude desert terrain. The Monument Valley community lies in Utah a few miles north of the Arizona state line. I arrive at the Yazzie residence. She lives in a thirty-year-old double-wide mobile home. It's now 5:17 p.m. and still light outside. I check out the vantage point of the teenage boys when they saw Atakai. From the road there is a clear view of the Yazzie's front door and the streetlight. Ms. Yazzie allows us in to see the back door which had been jimmed open with a screwdriver, the bedroom where the attack occurred, and the front door through which Atakai fled. When I ask how her daughter is doing, Ms. Yazzie begins crying. She is afraid that her daughter will never be the same. Since the incident she just sits... and stares out the window.

Whether the 9-year-old daughter is a "victim" under the Guidelines is not immediately clear. At the very least, she is entitled to services as a potential witness; however, it appears that she was emotionally traumatized as a direct result of the attack. While mere bystanders are typically not considered to be victims under the guidelines, U.S. Attorney's Office personnel have discretion to treat bystanders as victims after evaluating the facts and circumstances of a case. One of the factors to consider is whether the bystander is unusually vulnerable. *See* commentary to Guideline I.E. The Guidelines recognize the special needs of child victims and child witnesses. "A primary goal . . . shall be to reduce the trauma to child victims and witnesses caused by their contact with the criminal justice system . . . Justice Department personnel are required to provide child victims with referrals for services, and should provide child witnesses with services referrals." Guideline, VI.A. Whether a child is a victim or a witness, 18 U.S.C. § 3509(d)(1) requires that the child's name or other identifying information not be publicly

disclosed. *See also*, Guidelines VI.B.1. and VI.D.2. For example, the name of the child should not be used in unsealed charging documents or in unsealed affidavits submitted in support of warrants. *See, United States v. Broussard*, 767 F.Supp. 1545 (D. Or. 1991). If it is necessary to identify the child in court documents, then those documents can be submitted under seal pursuant to 18 U.S.C. § 3509(d)(2). *See also*, Guideline VI.B.1.b. In some circumstances, it may be advisable to have the court appoint a guardian ad litem to protect the best interests of the child. 18 U.S.C. § 3509(h); Guideline VI.B.2. Should the child need to testify in court at some point, 18 U.S.C. § 3509(e) authorizes the courtroom to be closed from the public during that testimony. *See also*, Guideline VI.D.3. Other safeguards for child witnesses who are required to testify are also available. *See generally*, 18 U.S.C. § 3509; Guideline VI.D.

During my interview of Ms. Yazzie, I try to be cognizant of Navajo cultural norms so as to win her trust - I avoid looking her in the eye. I ask her about what she thought the perpetrator meant when he said that it was because she "told someone about the other day." She says that she has no idea what he was talking about. The FBI conducts a photo spread, but she did not see the perpetrator's face. She did not recognize his voice either. Ms. Yazzie can not identify the suspect at all and her daughter is not responsive. I advised Ms. Yazzie of how the federal criminal justice process will likely proceed in her case and of the pending detention hearing. I give her my business card with my office's toll-free number written on it. Agent Toddman informs me that Atakai has no state or federal criminal history. I am now worried that the magistrate may not detain Atakai pending trial. This case is not going to be easy, but few violent crime cases are.

A victim of federal crime has a right "to be treated with fairness and with respect for the victim's dignity and privacy." 42 U.S.C. § 10606(b)(1); Guideline III.B.1. In most American cultures, looking someone in the eye is a sign of confidence, sincerity, and honesty. However, among traditional Navajo people,

looking someone in the eye is considered to be offensive, an affront, even a challenge to the other person. There are over 550 federally recognized tribes in the United States and most have unique cultural practices and beliefs. An AUSA can unwittingly damage a prosecution by innocently offending a victim or witness. Just as many litigators feel it is important to know your jury and tailor their approach to that panel, it is also important to know your witnesses so that you can tailor your approach to their beliefs, needs, and practices. By showing respect to native people and their unique sensibilities, an AUSA may be able to gain, not lose, an important witness. A caveat to all this is that many Native Americans do not follow the traditional practices of their ancestors and this may also affect your approach to a particular person. Know your victims and your witnesses. For more information, see, *Focus VW: Victim and Witness Issues in Indian Country* (Justice Television Network, Nov. 2001).

It is now Tuesday, and the detention hearing is scheduled for 3:00 p.m. All I have to support a request for detention pending trial is the violent nature of the offense coupled with an obscure statement to the victim of unknown significance. If the magistrate releases Atakai, I am afraid that by this time tomorrow he will be back on the reservation terrorizing Ms. Yazzie and her daughter again. I call Frank Denetsosie of the Navajo Nation Prosecutor's Office. I ask him to run a tribal court criminal history on Atakai. Within two hours Frank discovers that even though Atakai has no state or federal criminal history, his tribal court history shows twenty-seven convictions, including seven convictions for assault, four for battery, and two convictions for contempt of court. Mr. Denetsosie tells me that he will check the tribal court files, to determine if the contempt of court charges were possibly for violation of a protective order.

Working with tribal law enforcement officials is critical in Indian country cases. Tribal police are often the first responders, the first to initiate arrest, and the first to hear statements made by witnesses and suspects. Working with tribal

prosecutors should not be overlooked either. Depending on the tribe, tribal prosecutors may be able to provide you with access to tribal court criminal histories, tribal police reports, copies of tribal court pleadings, and copies of tribal laws that might otherwise be difficult to obtain. Transcripts of tribal court hearings can be very important. For example, a suspect who pleads guilty in tribal court to an offense, may be subject to cross-examination on that point in a subsequent federal prosecution if he then takes the stand and denies having committed the offense. See, *United States v. Denetclaw*, 96 F.3d 454 (10th Cir. 1996); *United States v. Tsinnijinnie*, 91 F.3d 1285 (9th Cir. 1996). Tribal criminal histories can be used to provide a basis for pretrial detention. Tribal court criminal histories can also be used in some situations as evidence of prior bad acts, *United States v. Tan*, 254 F.3d 1204 (10th Cir. 2001), or as a basis for an upward departure at sentencing where the federal/state criminal history does not adequately reflect the seriousness of the defendant's past criminal conduct. United States Sentencing Guidelines Manual § 4A 1.3(a). Working well with the local tribal police and prosecutors pays big dividends.

The cross-country scrambling has paid off. After I showed the federal pretrial services officer Atakai's tribal court criminal history, it was quickly adopted into the report. The magistrate did not hesitate to order Atakai detained pending trial. The trial date has been set and the Victim/Witness Coordinator from my office sent out a notice to Ms. Yazzie informing her of the date. Two weeks later, I received a fax from Frank Denetsosie, stating that the two tribal contempt of court convictions were for violations of a domestic violence protective order. The tribal court file showed that the victim in those cases was a Samantha Yazzie of Monument Valley, Utah! I cannot believe it - the victim in my case should have known who the attacker was! The voice mail indicator on my phone is blinking. I check it. There is a message from a sobbing Samantha Yazzie. "Please have that FBI guy meet me at my trailer tonight at 8:00. There is something important that I have to tell him."

When working on a violent crime case that may involve domestic violence in Indian country, it is important to find out whether or not there is a protective order in place. A domestic violence protective order that meets certain qualifications is valid nationwide both on- and off-reservation, whether or not it is issued by a state or tribal court. 18 U.S.C. § 2265(a). If a defendant is convicted of committing certain offenses while subject to a protective order, he may be subject to receiving a sentencing enhancement. These offenses include Aggravated Assault (United States Sentencing Guidelines Manual § 2A2.2(b)(5)), Threatening or Harassing Communications (United States Sentencing Guidelines Manual § 2A6.1(b)(3)), and Domestic Violence or Stalking (United States Sentencing Guidelines Manual § 2A6.2(b)(1)(A)).

Ms. Yazzie confided to Agent Toddman that she really did know who the suspect was. A victim-witness coordinator for the Navajo Nation had encouraged her to tell the rest of the story to the FBI. She told Agent Toddman that she originally said that she could not identify the attacker because, given his violent nature and past threats, she thought he would kill her if she identified him. She then said that Atakai was her ex-boyfriend. After they had broken up three years earlier, he became jealous, angry, and violent. He started drinking and moved off-reservation. She eventually went to tribal court and obtained a domestic violence protective order against him. The court order did not stop him and he was arrested by tribal police three times. He pled guilty the first two times, but the charges from the third case were still pending. On the night of the "big incident", she had received a phone call from him stating that he was coming to Monument Valley to beat her up for testifying against him in tribal court and to teach her a lesson so she would not "talk to that judge" anymore.

Many tribes run their own victim-witness programs. Where these tribal programs exist, they are an extremely valuable resource because they are usually located in the local community close to the victims and witnesses. While the USAO victim-witness coordinators are often only a

telephone call away, this may be of little consolation to someone located hundreds of miles away in a rural area that may have no telephone service. Victim-witness coordinators from the USAOs should coordinate their efforts with their tribal counterparts. United States Attorneys' Manual (USAM) 3-7.330(D). For a good example of a tribal victim services program and its interaction with the USAO, see, *Crime Victim Rights Week: Indian Country* (Justice Television Network, April 2002). During judicial proceedings, victims and witnesses should be given information and assistance regarding transportation, parking, child care, translation services, etc., Guideline IV.B.2.f., and must be provided a separate waiting area from the defendant and the defendant's witnesses. 42 U.S.C. § 10607(c)(4); Guideline, IV.B.2.c.

It cannot be overstated that developing good rapport with victims and witnesses is essential. If there is something that is damaging to your case, it is better to find out about it before trial - not during an aggressive cross-examination. While it is apparent that Ms. Yazzie's original statement that she did not know who the suspect was will be useful for the defense during cross-examination, at least now the prosecution has forewarning of the inaccuracy and appropriate measures can be taken to prepare for trial. In addition, it now appears that there may be grounds to include one or more counts in the indictment for violation of the Violence Against Women Act (VAWA). VAWA prohibits such things entering Indian country to commit domestic violence (18 U.S.C. § 2261(a)(1)), entering Indian country to stalk (18 U.S.C. § 2261A), and entering Indian country in order to violate a tribal court (or state court) protection order (18 U.S.C. § 2262(a)(1)). In other words, good rapport with victims and witnesses can help prosecutors develop the information needed to develop a solid case and also to prepare to counter arguments that are likely to be raised by defense counsel.

I presented the case to the Grand Jury on Wednesday. A True Bill was entered for aggravated assault and for violations of the VAWA. Cecelia Foster, the Victim/Witness Coordinator for the United States Attorneys Office, did a great job making sure that all of

the appropriate notices were sent to Ms. Yazzie. As the trial date approached, Cecelia made sure that Ms. Yazzie and the trial witnesses had transportation to Salt Lake City and a place to stay at a local hotel. The United States Attorney's Office's witness waiting room at the courthouse was readied. One of the 19-year-old boys who had identified Atakai on the night of the attack, stated that he felt more comfortable speaking in Navajo and so arrangements were made for a Navajo/English language translator. Ten days before trial, a tentative plea agreement was worked out. I called Ms. Yazzie for her input on the arrangement. She wholeheartedly agreed with the terms. She stated that she was relieved that her daughter would not have to testify; however, she had a strong desire to make a statement herself at the sentencing hearing. After informing Ms. Yazzie of my intention to accept the guilty pleas, I told her how to contact the probation officer in order to file a victim impact statement for the pre-sentence report.

A victim of federal crime has "The right to confer with [an] attorney for the Government in the case." 42 U.S.C. § 10606(b)(5); Guideline III.B.5. The AUSA should make reasonable efforts to obtain victim views on proposed or contemplated plea agreements. Guideline IV.B.2.b.(2). In plea agreements, Federal prosecutors must also consider "requesting that the defendant provide full restitution to all victims of all charges contained in the indictment or information, without regard to the count to which the defendant actually plead[s]." Pub .L. No. 104-132 § 209; *see also*, Guideline V.C., and United States Attorneys Manual § 9-16.320.

After plea or conviction, the victim should be notified how to contact the probation officer and how to prepare a victim impact statement (Fed R. Crim. P. 32(b)(4)(D)) for inclusion in the pre-sentence report (Guideline IV.B.3.a.1.) and shall be notified of the right to mandatory restitution and how to obtain it. 18 U.S.C. §§ 3663-3664; 42 U.S.C. § 10607(c)(1)(B); Guideline V.A. The victim impact statement should be submitted to the United States Probation office for inclusion in

the pre-sentence report (it should not be submitted directly to the judge, *United States v. Curran*, 926 F.2d 59 (1st Cir. 1991)). In appropriate cases, the victim impact statement must contain information sufficient to support a restitution order. Fed. R. Crim. P. 32(b)(4)(F). In cases involving crimes of violence or sexual abuse, the victim has a right to make a statement at the sentencing hearing. Fed .R. Crim. P. 32(c)(3)(E); Guideline IV.B.3.b.2. If a defendant is incarcerated, the victim has a right to information concerning the imprisonment and release of the offender from the Bureau of Prisons. 42 U.S.C. § 10606(b)(7) and 10607(c); Guideline III.B.7; *See also*, Guidelines IV.B.2.a.5. and IV.C.2.a.

Conclusion

The Assistant United States Attorney working cases from Indian country needs to take into consideration the Attorney General Guidelines for Victim and Witness Assistance (2000), and the statutes and court rules that impact the relationship between prosecutors, victims, and witnesses. At first glance, the guidelines may seem confusing and overwhelming; however, most of the guidelines merely put in writing the things that we would be doing for victims and witnesses even if there were no formal guidelines. After all, taking up the cause of crime victims is what we do on a daily basis.❖

ABOUT THE AUTHOR

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